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Supreme Court of the United States

SUPREME COURT, U.S.
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October Term, [redacted] 1970

No. 350

THE LOS ANGELES HERALD-EXAMINER, Division of The Hearst Corporation; and THE SAN FRANCISCO EXAMINER, Division of The Hearst Corporation,

Petitioners,

vs.

RALPH E. KENNEDY, REGIONAL DIRECTOR OF REGION 21 OF THE NATIONAL LABOR RELATIONS BOARD, for and on behalf of the NATIONAL LABOR RELATIONS BOARD; SAN FRANCISCO-OAKLAND NEWSPAPER GUILD; NEWSPAPER AND PERIODICAL DRIVERS' AND HELPERS' UNION LOCAL 921; LOS ANGELES NEWSPAPER GUILD, LOCAL 69; LOS ANGELES WEB PRESSMAN'S UNION NO. 18; LOS ANGELES STEREOTYPERS' UNION NO. 58; LOS ANGELES TYPOGRAPHICAL UNION NO. 174; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE NO. 94; GENERAL WAREHOUSEMAN'S UNION LOCAL 598; BUILDING SERVICE AND MAINTENANCE EMPLOYEES UNION NO. 399; LOS ANGELES MAILERS' UNION NO. 9; AND LOS ANGELES PAPER HANDLERS' UNION NO. 3,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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IN THE

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No. .....

THE LOS ANGELES HERALD-EXAMINER, Division of The Hearst Corporation; and THE SAN FRANCISCO EXAMINER, Division of The Hearst Corporation,

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vs.

RALPH E. KENNEDY, REGIONAL DIRECTOR OF REGION 21 OF THE NATIONAL LABOR RELATIONS BOARD, for and on behalf of the NATIONAL LABOR RELATIONS BOARD; SAN FRANCISCO-OAKLAND NEWSPAPER GUILD; NEWSPAPER AND PERIODICAL DRIVERS' AND HELPERS' UNION LOCAL 921; LOS ANGELES NEWSPAPER GUILD, LOCAL 69; LOS ANGELES WEB PRESSMAN'S UNION NO. 18; LOS ANGELES STEREOTYPERS' UNION NO. 58; LOS ANGELES TYPOGRAPHICAL UNION NO. 174; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE NO. 94; GENERAL WAREHOUSEMAN'S UNION LOCAL 598; BUILDING SERVICE AND MAINTENANCE EMPLOYEES UNION NO. 399; LOS ANGELES MAILERS' UNION NO. 9; AND LOS ANGELES PAPER HANDLERS' UNION NO. 3,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioners, the Los Angeles Herald-Examiner, Division of The Hearst Corporation, and the San Francisco Examiner, Division of The Hearst Corporation, charging parties in an action filed by the National Labor Relations Board, pray that a writ of certiorari issue to review the final orders of the United States Court of Appeals for the Ninth Circuit denying petitioner party status.

Opinions Below

The court of appeals' orders dismissed petitioners' appeal of a decision of the district court dissolving temporary injunctions issued pursuant to Section 10(1) of the National Labor Relations Act, as amended, 29 U.S.C. Section 160(1), and denied petitioners' motion to intervene in the appeal of the National Labor Relations Board. Neither of these orders was officially reported or accompanied by an opinion of the court and are attached in Appendix A.

Jurisdiction

The orders of the court of appeals dismissing petitioners' appeal and denying petitioners' motion to intervene were entered on May 19, 1970, and June 15, 1970, respectively. The jurisdiction of this Court to review the court of appeals' orders is invoked under 28 U.S.C. Section 1254 (1).

Questions Presented

1. Does a charging party, in an action filed by the National Labor Relations Board under Section 10(1) of the National Labor Relations Act, as amended, 29 U.S.C. Section 160(1), have standing to initiate appellate review of an adverse and prejudicial district court decision?

2. Does a charging party, in an action filed by the National Labor Relations Board under Section 10(1) of the National Labor Relations Act, as amended, 29 U.S.C. Section 160(1), have the right to intervene as a party in the National Labor Relations Board's appeal of an adverse and prejudicial district court decision?

Statute Involved

Section 10(1) of the National Labor Relations Act, as amended, 29 U.S.C. Section 160(1), provides in relevant part:

> "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 158(b) of this title . . . . If, . . . the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States . . . for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law. . . . Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony . . . ."

Statement of the Case

This case originated from charges filed with the National Labor Relations Board (hereinafter referred to as the "Board") by petitioners alleging that the respondent labor organizations had engaged in and were engaging in illegal secondary boycotts within the meaning of Section 8(b)(4)(B) of the National Labor Relations Act, as amended, (hereinafter referred to as the "Act"). After a preliminary investigation, respondent Ralph E. Kennedy, Regional Director of Region 21 of the Board, concluded that there was reasonable cause to believe that the respondent labor organizations were engaging in unfair labor practices and, pursuant to Section 10(l) of the Act, filed a petition in the United States District Court for the Northern District of California seeking a temporary injunction pending a final adjudication by the Board. Thereafter, by their counsel, all parties, including petitioners, appeared, presented evidence and orally argued. On February 7 and 8, 1968, the district court found there was reasonable cause to believe that an unfair labor practice had occurred and issued temporary injunctions.

Thereafter, the respondent labor organizations appealed to the United States Court of Appeals for the Ninth Circuit. Petitioners herein moved to intervene as appellees in that action, but the court of appeals ultimately denied that motion, relegating petitioners to the role of *amici curiae*. Petitioners herein then petitioned this Court for a writ of certiorari to review the court of appeals' decision denying intervention, but such petition was denied. 393 U.S. 926 (1968). On June 4, 1969, the court of appeals affirmed the district court's decision. *San Francisco-Oak-*

land Newspaper Guild, et al. v. Kennedy, 412 F. 2d 541 (9th Cir. 1969).

On February 20, 1970, the respondent labor organizations moved the district court to dissolve the temporary injunctions because of the Board's inordinate delay in deciding the underlying unfair labor practice case. Petitioners and respondent Kennedy each appeared by counsel, presented evidence, filed pleadings and orally argued in opposition to the motion to dissolve. On April 6, 1970, the district court entered an order dissolving the temporary injunctions. That same day petitioners and respondent Kennedy filed separate notices of appeal and each moved the court of appeals to stay the order of the district court during the pendency of the appeal.

On April 14, 1970, the court of appeals granted petitioners' motion to stay the district court's order but took no action on respondent Kennedy's motion. Subsequently respondent Kennedy and respondent labor organizations each moved the court of appeals to dismiss petitioners' appeal for lack of standing. Respondent Kennedy further moved the court to reconsider and modify its order granting a stay to reflect that the stay was granted pursuant to respondent Kennedy's motion. On May 19, 1970, the court of appeals dismissed petitioners' appeal and modified the order granting the stay to reflect that it was issued pursuant to respondent Kennedy's motion. On May 28, 1970, petitioners moved the court of appeals for leave to intervene in respondent Kennedy's appeal; this motion was denied on June 15, 1970.

Reasons for Granting the Writ

1. The issue raised in this petition is important and recurring in the administration of the National Labor Relations Act.

This issue involves the obtaining of injunctive relief under Section 10(l) of the Act. In 1947, Congress, by enacting Section 8(b)(4)(B) of the Labor Management Relations Act, made it an unfair labor practice for a labor organization to engage in a secondary boycott. As a result of extensive evidence regarding the substantial injury to neutral employers victimized by an unlawful secondary boycott, Congress imposed, in Section 10(1), a mandatory duty upon the Board to seek injunctive relief whenever it has reasonable cause to believe that an employer's charge of an illegal secondary boycott is meritorious. Moreover, Congress took the unusual action in Section 10(l) of authorizing district courts to provide injunctive relief for such employers, and exempted such proceedings from the prohibitions of the Norris-La Guardia Act. This Congressional action clearly shows that Congress considered the obtaining of injunctive relief under Section 10(l) to be an important matter. In 1959, Congress, in amending the Labor Management Relations Act of 1947 by expanding its coverage, again indicated the importance of Section 10(1).

The same issue raised in this petition was before the Court in *Sears Roebuck & Co. v. Local 419 Carpet Layers*, 90 S. Ct. 1299 (1970). The Court, after granting certiorari and hearing oral argument, ruled that the case had been rendered moot by the Board decision on the merits of the initial charge—a fact present and

briefed when certiorari was granted. The importance of this issue to the administration of the Act is persuasively exhibited by the Board's position on the mootness issue in *Sears*. During oral argument, Dominich L. Manoli, Associate General Counsel for the Board, stated: "[W]hile I think our argument on the mootness is strong, at the same time I would like to have an answer from the Court as to the standing of charging parties in this case." In response to a question from the bench suggesting that the Board would like the decision only if favorable to its position, Mr. Manoli answered: "Either way, your honor, either way." *Sears*, Record of Oral Argument at 48.

The recurrent nature of the initial question of this petition is demonstrated by the fact that it has been before the Court this term in three separate cases: the instant case; *Sears;* and *Terminal Freight Cooperative Asso. v. Samoff*, Docket No. 1481, Oct. Term 1969; *cert. denied*, June 16, 1970, 38 U.S. L.W. 3497, where the Board also argued mootness. Moreover, the recurrent nature of the second question of this petition is demonstrated by the fact that it was raised last term in *Los Angeles Herald-Examiner v. San Francisco-Oakland Newspaper Guild, et al.*, 393 U.S. 926 (1968). The issue presented in this petition would have been decided in *Sears* but for the fact that the Court held that case to be moot. The instant case is not moot and is ripe for decision on this important and recurring question.

2. The orders of the court of appeals dismissing petitioners' appeal and denying leave to intervene conflict with general principles enunciated by this Court in *Local 238 UAW v. Scofield* and *Local 133 UAW v. Fafnir Bearing Co.*, 382 U.S. 205 (1965).

In *Fafnir*, a successful charging party before the Board sought to intervene in the court of appeals' review of the Board's decision. The Court of Appeals for the Second Circuit refused intervention and relegated the charging party to *amicus curiae* status. This Court reversed, stating that the status of *amicus* would not assure the charging party that its private interests created by the Act would be adequately protected by the Board. Of particular concern to the Court was the possibility that the status of *amicus* would not entitle the charging party to petition this Court for a writ of certiorari to review an adverse appellate court decision. 382 U.S. at 214-16.

The underlying theory of *Fafnir* is that, since a charging party is accorded certain private rights, it is inconsistent to force such charging party to rely upon the Board to protect those interests. This rationale applies equally well to the instant situation, for petitioners face the distinct possibility that the Board may not advance arguments necessary to protect the interest of petitioners in appealing the district court's dissolution of the temporary injunctions. In this case the injunctions were dissolved solely because of the Board's delay in deciding the underlying unfair labor practice case and the Board has not argued that a Writ of Mandamus against it is a more appropriate remedy than dissolution of the restraining orders. The impact of the dissolution operates solely on the charging parties, who have no control over the

Board's administrative delay. *Cf. NLRB v. J. H. Rutter-Rex Mfg. Co., Inc.*, 396 U.S. 258 (1969). However, a writ of mandamus would cause a Board decision, the relief desired.

As was noted in *Fafnir*, there are numerous other reasons why the Board may not adequately represent the private interests of charging parties, ranging from an unfavorable attitude toward petitioners' position to reasons unrelated to the merits of the controversy. Nowhere is this better illustrated than in *Sears*, where the regional director declined to appeal the adverse district court decision. Both the trial examiner and the Board ruled that Sears' unfair labor practice charge was meritorious. Thus, Sears, the aggrieved charging party, was denied Section 10(1) relief in a situation for which it was unquestionably intended solely because it was held not to have the right to appeal the district court's clearly erroneous refusal to issue a Section 10(1) injunction.

The fact that the Board initiates an appeal, as it has in this case, does not guarantee that the appeal will not be dismissed. Should the regional director withdraw his appeal, for whatever reason, or should he not petition this Court for certiorari in the event of an adverse court of appeals' decision, petitioners would be denied the right to have this Court review the decision of the district court on the merits. As demonstrated by *Sears*, this can produce harsh, unfair results that circumvent the express purposes of Section 10(1). Moreover, protection of petitioners' statutorily established private rights would be left to the discretion of another party which is clearly in derogation of the principles established in *Fafnir*.

3. The decision by the court of appeals erroneously interprets and applies Section 10(l) of the Act. The effect of the decision that charging parties may not initiate an appeal or intervene in the Board's appeal is that they are not to be accorded the status of parties. Section 10(l) expressly provides that:

> "Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony . . . ."

The natural consequence of these express provisions is that the charging party in the district court, without the approval of the court or of the other parties, may call and cross-examine witnesses, offer evidence, introduce documents, argue orally and file briefs. These statutorily created participatory rights equal those of a party and exceed those accorded *amici curiae*. *Amici* are not entitled to control or develop the record by introducing evidence, raising objections or arguing during the course of the litigation.

Pursuant to their rights under Section 10(l), petitioners-charging parties actively participated in the district court's proceedings by appearing, filing pleadings and orally arguing. Having done so, it is only just and reasonable that they be entitled to seek review of an adverse decision. In an analogous case, the same court of appeals held that because Section 206 of the Bankruptcy Act (11 U.S.C. Section 606) provides that various persons not named as parties in the statute have a statutory right to be heard in the original bankruptcy proceedings, there necessarily must be a concomitant right of such persons to appeal an adverse

decision. *Gleeson v. Carr*, 219 F. 2d 64, 67, *cert. denied*, 350 U.S. 827 (1955). Charging parties in Section 10(l) proceedings at the district court level have the "right to be heard" and by a parity of reasoning should be entitled to initiate an appeal or, at the very least, should be entitled to intervene in the Board's appeal.

It is anticipated that respondents will contend that the Norris-La Guardia Act denies petitioners the status of parties at any stage of Section 10(l) litigation. However, the scheme of Section 10(1) demonstrates that its purpose was to limit the right of employers to initiate injunction proceedings, not to deny them party status. This measure represented a congressional compromise between a need to protect neutral employers from secondary boycotts and a desire to preserve the Norris-LaGuardia Act. Mandatory injunctive relief was afforded employers as an effective remedy for secondary boycotts, but the right to initiate such relief was limited to the Board. Charging parties were expressly accorded full participatory rights in the proceedings once instituted in the district court. To proscribe the application of the Norris-LaGuardia Act to Section 10(l) proceedings, Section 10(h) of the Act exempts all of Section 10 from the prohibitions of Norris-LaGuardia.

The view that charging parties must rely upon the Board to protect their interests throughout the entire course of the litigation is an illogical extension of the Board's exclusive right to initiate Section 10(l) proceedings. It does not follow that restrictions on the right to initiate district court proceedings dictate that charging parties must be denied party status at any stage of the litigation. Such a conclusion confuses the related but distinct concepts of jurisdiction and relief.

The court of appeals has recognized this distinction in *Local 137 Retail Clerks v. Food Employers Council, Inc.*, 351 F. 2d 525 (9th Cir. 1965). In that case the regional director petitioned the district court for Section 10(1) injunctive relief to prevent enforcement of a "hot cargo" agreement. Instead of pursuing that petition, the regional director entered into a stipulated settlement and sought court approval in lieu of an injunction. The charging parties successfully urged the district court to grant injunctive relief pursuant to the regional director's petition. On appeal, the court of appeals held that once the regional director had complied with his mandatory duty to initiate a suit for injunctive relief, the charging parties could pursue that relief so long as they did not independently petition the court and so long as they sought the same relief, reasoning that charging parties were merely "supporting" the original petition. In the instant case, petitioners' appeal supports not only the regional director's original suit for injunctive relief but also his appeal to reverse the district court's wrongful recision of that relief. On the basis of this reasoning, it is submitted that, once the Board initiates a Section 10(1) proceeding, jurisdiction attaches and the question becomes one of the nature of relief available, not the authority of the court to grant relief. Hence, the court of appeals' decision that charging parties lack standing to seek appellate relief from an adverse decision of the district court is erroneous.

Conclusion

For the foregoing reasons, it is urged that this petition for writ of certiorari be granted.

Respectfully submitted,

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Attorney for Petitioners.

Of Counsel:

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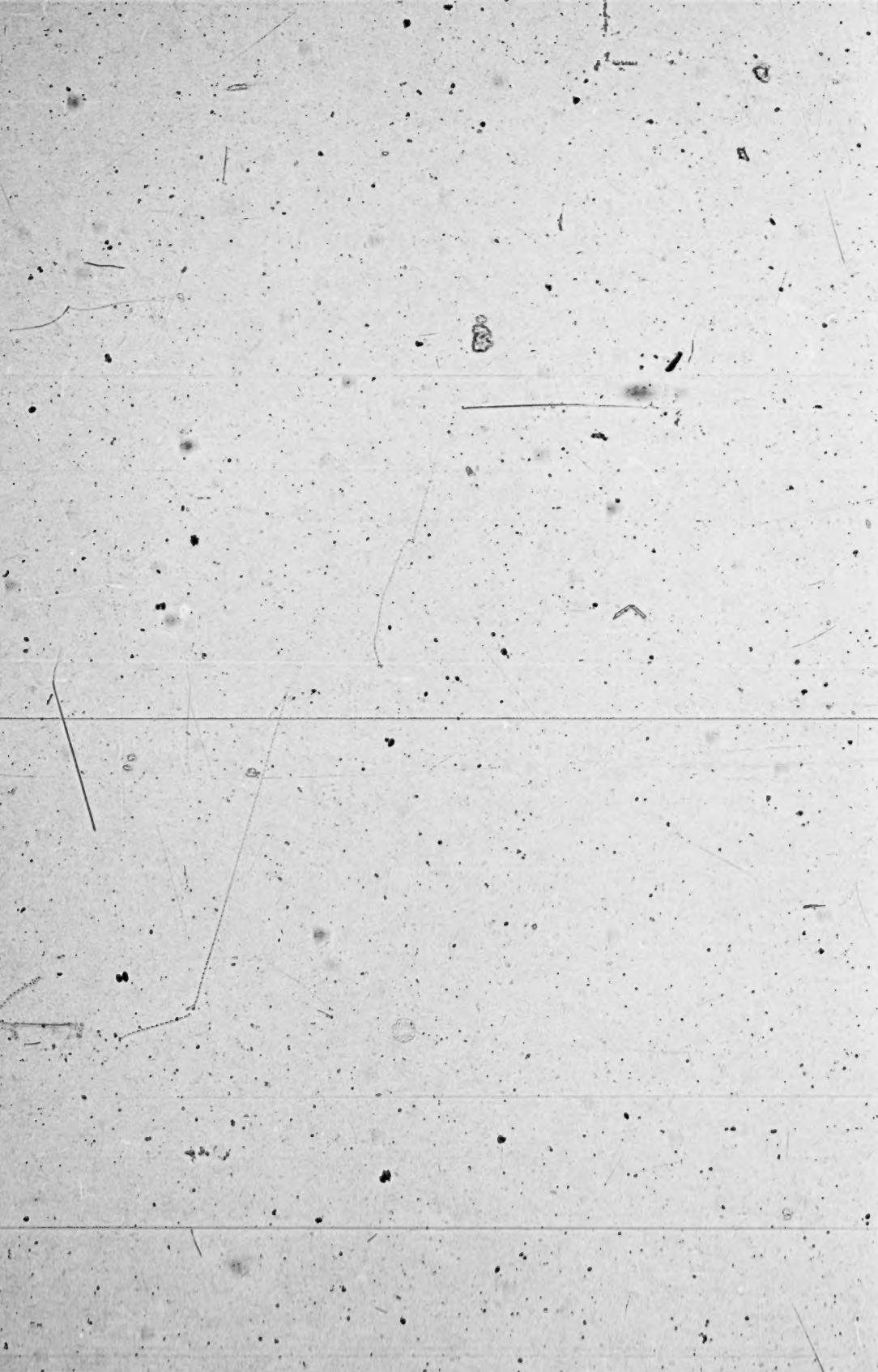
MCENERNEY & JACOBS,
STEPHEN P. PEPE,
O'MELVENY & MYERS,

June 30, 1970.



APPENDIX A.

ORDER

On Motion for Reconsideration and for Modification of Order Granting Stay.

United States Court of Appeals, for the Ninth Circuit.

Ralph E. Kennedy, Regional Director of Region 21 of the National Labor Relations Board, for and on behalf of the National Labor Relations Board, Appellant, v. San Francisco-Oakland Newspaper Guild, et al., Appellees. No. 25,655, No. 25,656.

Filed: May 19, 1970.

On April 14, 1970, this court entered an order in cause No. 25,655 granting a motion of appellants charging parties for a stay of an order dissolving temporary injunctions pending determination of the appeal and granting an application to expedite the appeal. That order is hereby VACATED.

The motion of appellant, Ralph E. Kennedy, Regional Director of Region 21 of the National Labor Relations Board, to dismiss the appeal of the Los Angeles Herald-Examiner, Division of the Hearst Corporation, and the San Francisco Examiner, Division of the Hearst Corporation, charging parties in proceedings filed before the National Labor Relations Board on April 6, 1970 is hereby GRANTED.

The application of Regional Director of Region 21 of the National Labor Relations Board, appellant in cause No. 25,656, for a stay of so much of the order of the court below dissolving temporary injunctions not stayed pending determination of the appeal, good

cause having been shown therefor, is hereby GRANTED, and it is

ORDERED that the order of the court below granting motion to dissolve temporary injunction and the supplemental temporary injunction entered in the United States District Court for the Northern District of California on February 7 and 8, 1968, respectively, in Civil No. 48511, is STAYED fully and in all respects and such injunctions are deemed to be in full force and effect pending determination of the appeal herein.

Briefs may be filed in the ordinary course.

James M. Carter
Orell M. Trask
Circuit Judges

ORDER

In the United States Court of Appeals for the Ninth Circuit.

Ralph E. Kennedy, Regional Director of Region 21 of the National Labor Relations Board, for and on behalf of the National Labor Relations Board; Appellant, vs. San Francisco-Oakland Newspaper Guild; et al., Appellees. No. 25,656.

Filed June 15, 1970.

Before: MERRILL and TRASK, Circuit Judges.

Leave to intervene sought by charging parties, the Los Angeles Herald-Examiner, Division of The Hearst Corporation, and the San Francisco Examiner, Division of The Hearst Corporation, is hereby denied.

Charles M. Merrill
Orell M. Trask
Circuit Judges

APPENDIX B.

ORDER GRANTING MOTION TO DISSOLVE TEMPORARY INJUNCTIONS

United States District Court, Northern District of California.

Ralph E. Kennedy, etc., Petitioner, v. San Francisco-Oakland Newspaper Guild, et al., Respondents. Civil No. 48511.

This cause came on to be heard upon respondents' motion to dissolve temporary injunctions.

Upon consideration of the motion, responses thereto, affidavits, and other evidence, briefs, arguments of counsel, and the entire record in the case, and the Court being fully advised in the premises, and good cause appearing therefor,

IT IS HEREBY ORDERED that respondents' motion to dissolve the temporary injunction granted herein on February 7, 1968, and the supplemental temporary injunction granted herein on February 8, 1968, be, and the same hereby is, granted, and the said injunctions are hereby dissolved.

Dated: April 6, 1970.

/s/ Alfonso J. Zirpoli
United States District Judge

MOTION FILED

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF POSITION OF PETITIONER

And

BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

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Comes now the United States Chamber of Commerce (hereinafter called "the Chamber",) by its attorneys, Milton A. Smith, Anthony J. Obadal, Lawrence M. Cohen and Theodore J. Tierney, and respectfully requests leave under Supreme Court Rule 42 to file a brief as *amicus*

curiae supporting the petition of petitioner, the Los Angeles Herald-Examiner, Division of Hearst Corporation, and the San Francisco Examiner, Division of the Hearst Corporation, urging the court to grant the petition for a writ of certiorari to the United States Court of Appeals for the Ninth District, for the following reasons:

1. The Chamber of Commerce of the United States is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade and professional associations, a direct business membership in excess of 38,000, and an underlying membership of approximately 5,000,000 business firms and individuals. It is the largest association of business and professional organizations in the United States.

2. The Chamber has appeared as *amicus curiae* in labor relations matters which have effected employers in a wide variety of enterprises. Matters of particular concern in which the Chamber has recently filed *amicus* briefs involve: the dictation by the National Labor Relations Board of the terms and conditions of collective bargaining agreements;[1] the question of whether or not it is necessary, in order to establish a violation of Section 8(b)(4)(B) of the Act, to show that a union's object is to bring about a total cessation of business between the neutral and primary employer;[2] and the question of whether or not the Norris-LaGuardia Act prevented the federal courts from issuing injunctions regarding strikes in violation of collective bargaining agreements.[3]

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1. Brief *amicus curiae* in *H. K. Porter Company* v. *NLRB*, No. 230, October Term, 1969.

2. Brief *amicus curiae* in *Burns and Roe, Inc.* v. *Operating Engineers*, No. 570, October Term, 1969.

3. Brief *amicus curiae* in *Boys Markets* v. *Clerk's Union*, No. 768, October Term, 1969. In addition, the Chamber filed an *amicus* brief in the earlier but related case of *Avco Corp.* v. *Aero Lodge 735*, 390 U. S. 557 (1968).

3. The subject of the instant case—the standing of a charging party to appeal an adverse judicial determination in a proceeding for temporary injunctive relief against an unlawful secondary boycott—is a matter of substantial concern to the Chamber. In 1947 and 1959, Congress sought to protect neutral bystanders from being embroiled in the labor disputes of others. Despite the enactment of the Taft-Hartley Act and the Landrum-Griffin amendments to the National Labor Relations Act, however, many unions continue to resort to unlawful secondary conduct to achieve their goals.[4]

The injunctive protection afforded by Section 10(l) of the National Labor Relations Act is the only defense available to employers who are the victims of unlawful secondary boycotts. Any dilution of the effectiveness of this remedy by restricting the neutral employer's participation in 10(l) proceedings can only encourage industrial strife rather than promote free collective bargaining and harmonious labor-management relations. If this motion for a leave to file an *amicus* brief is granted, the Chamber will offer for the Court's consideration the broader viewpoint regarding the vital interest of all employers in maintaining to the fullest possible extent the remedies provided by Congress to combat the unlawful secondary boycott.

4. The Chamber, pursuant to Rule 42 of the Rules of this Court, requested consent from all parties to file a brief *amicus curiae* in this matter. While consents were forthwith received from the Honorable Erwin N. Griswold, Solicitor General of the United States and from the petitioner,

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4. Of the total unfair labor practice charges filed against unions under Section 8(b) of the Act during NLRB fiscal years 1967 and 1968, *32 per cent, or nearly 3700 charges*, involved alleged violations of the secondary boycott provisions of Section 8(b)(4). *Thirty-second Annual Report of the National Labor Relations Board*, p. 218 (1967); *Summary of Operations of NLRB General Counsel*, reprinted in 70 LRR 459 at 468 (1969).

The Los Angeles Herald-Examiner and The San Francisco Examiner, Divisions of Hearst Corporation, consent was not received from the following named respondents:

San Francisco Oakland Newspaper Guild, Newspaper and Periodical Drivers' and Helpers' Union Local 921; Los Angeles Web Pressman's Union No. 18; Los Angeles Stereotypers' Union No. 58; Los Angeles Typographical Union No. 174; International Association of Machinists and Aerospace Workers, District Lodge No. 94; General Warehouseman's Union Local 598; Building Service and Maintenance Employees Union No. 399; Los Angeles Mailers' Union No. 9; and Los Angeles Paper Handlers' Union No. 3.

WHEREFORE, in recognition of these considerations and in view of the importance of the issues involved to all member-employers, whose consensus the Chamber is authorized to set forth before the Court, it is respectfully requested that this Motion for Leave to File a Brief *Amicus Curiae* be granted for such purposes.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 350.

The Los Angeles Herald-Examiner, Division of The Hearst Corporation; and The San Francisco Examiner, Division of The Hearst Corporation,

Petitioners,

vs.

Ralph E. Kennedy, Regional Director of Region 21 of the National Labor Relations Board, for and on behalf of the National Labor Relations Board; San Francisco-Oakland Newspaper Guild, Newspaper and Periodical Drivers' and Helpers' Union Local 921; Los Angeles Web Pressman's Union No. 18; Los Angeles Stereotypers' Union No. 58; Los Angeles Typographical Union No. 174; International Association of Machinists and Aerospace Workers, District Lodge No. 94; General Warehouseman's Union Local 598; Building Service and Maintenance Employees Union No. 399; Los Angeles Mailers' Union No. 9; and Los Angeles Paper Handlers' Union No. 3,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

INTEREST OF THE AMICUS CURIAE.

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade

associations, with an underlying membership of approximately 5,000,000 business firms and individuals and a direct business membership in excess of 38,000.

The Chamber views this case as one raising recurrent and important questions of first impression involving an area of vital concern to all employers. Congress has recognized that the secondary boycott is a vicious and devastating economic weapon;[1] it is destructive to the free flow of commerce and places the neutral employer in grave jeopardy of losing all or part of his established business. Accordingly, Congress not only outlawed such conduct, but provided an immediate remedy for the protection of the victimized employer by the enactment of Section 10(l) of the National Labor Relations Act.[2] This provision particularly reflects the sense of grave congressional concern that such conduct be terminated. Unlike other provisions of the federal laws, this section:

1. Commands the Board to give the investigation of such charges immediate priority over all other charges, and
2. Orders the Board, without exception or allowance for discretion, to petition a federal district court for temporary injunctive relief pending final adjudication upon a mere showing of reasonable cause to support the merits of the charge.

In addition, the legislative history of this provision only underscores the patent sense of legislative urgency permeating Section 10(l).[3] In the face of such a clear congressional purpose, any erosion of the effectiveness of this

1. See, *e.g.*, II, *Legislative History of the Labor-Management Reporting Act of 1959*, pps. 989, 1376, 1425, 1446, 1842 (1959).

2. National Labor Relations Act, 49 Stat. 449 (1935), as amended, 29 U. S. C. § 151 *et seq.* (hereinafter referred to as the "Act").

3. Senate Report No. 105, 80th Cong., 1st Sess. (1947).

remedy cannot be sanctioned. Yet, the decision of the court below, if allowed to stand, can only bring about such a result.

Review by this Court is necessary for the additional reason that, despite the far-reaching remedy provided by Section 10(l), neutral employers are being subjected to the unlawful and economically devastating secondary boycott at an alarming rate.[4] In this respect, it is submitted that the remedy designed to prevent such conduct can not be realistically effective unless the courts recognize that "private interests [are] at stake" in Section 10(l) proceedings as this Court has acknowledged regarding proceedings which involve other provisions of the Act.[5] This is so because, once the government institutes 10(l) proceedings, the interest of the neutral employer—the strong self-interest of preserving his business—assures the most vigorous pursuit of the injunctive remedy to halt the unlawful secondary boycott. On the other hand, this Court has recognized that by ignoring the private interest of the employer and, therefore, denying his standing to appeal,

4. Of the total unfair labor practice charges filed against unions under Section 8(b) of the Act during NLRB fiscal years 1967 and 1968, *32 per cent, or nearly 3700 charges*, involved alleged violations of the secondary boycott provisions of Section 8(b)(4). *Thirty-second Annual Report of the National Labor Relations Board*, p. 218 (1967); *Summary of Operations of NLRB General Counsel*, reprinted in 70 LRR 459 at 468 (1969). In additon, over 50% of the charges involving Section 10(l) in 1969 were filed by small employers with less than 30 employees. *Thirty-third Annual Report of the National Labor Relations Board*, Table 18, pp. 238-9, *supra*. Thus, it is all the more important that the Chamber present to the Court the consensus of these small employers who do not have the individual resources for such purposes.

5. *United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, Local 283* v. *Scofield, et al.; United Automobile, Aerospace and Agricultural Implement Workers, et al.* v. *Fafnir Bearing Company, et al.*, 382 U. S. 205 (1965).

as the lower court has done here, aggressive pursuit of the statutory remedy cannot be assured.[6]

Moreover, this case raises questions vital to the interests of all employers for the additional reason that injunctive protection afforded by Section 10(l) of the Act extends to unlawful union recognitional picketing and improper "hot-cargo" agreements as well as secondary boycotts.[7] Thus, the protection of this section is the only effective bulwark available to employers subjected to such outlawed

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6. In *Scofield*, the Court stated:

> The Labor Board may also adversely affect the rights of the private parties in other instances. For example, the Board may decide a case and later re-evaluate its position at a time when that case is before an appellate court. The General Counsel, in such a situation, cannot be expected wholeheartedly to attempt to convince an appellate court of the correctness of a doctrine which the Board itself has abandoned.

It is difficult to imagine a more striking example of what the Court was referring to in the above-quoted passage than the case of *Sears, Roebuck and Co. v. Local 419 Carpet Layers*, 90 S. Ct. 1299 (1970). The employer there filed secondary boycott charges and the regional director sought 10(l) temporatory injunctive relief. The district court, however, declined to order such relief, and the regional director elected not to appeal that decision for reasons he refused to disclose (See page 4 of Petitioner's Reply Brief in *Sears, supra*). Yet, subsequently, the Board issued its decision finding that the Union's conduct had violated the secondary boycott prohibition. The employer's attempt to appeal was frustrated by the Circuit Court's holding that it lacked standing; this Court ultimately found the question to be moot because of the issuance of the Board's order.

7. The number of unfair labor practice charges alleging union recognitional picketing in violation of Section 8(b)(7) has been increasing substantially. Between NLRB fiscal years 1966 and 1967, for example, the number of such charges rose 39 percent. *Thirty-second Annual Report of the National Labor Relations Board, supra at* 218; *Thirty-first Annual Report of the National Labor Relations Board*, p. 186 (1966). As in the case of charges alleging unlawful secondary boycotts, if the Board finds reasonable cause to believe that such charges are true and that a complaint should issue, it is *required* under Section 10(l) to petition for appropriate injunctive relief pending the final adjudication by the Board with respect to such matter.

union pressures.[8] Any dilution of this protection, such as that which will be occasioned by the decision below, will foster the very industrial strife the Act was designed to prevent.

These important questions regarding the scope of the employer's right to participate fully and effectively in 10(l) proceedings at all stages goes to the very substructure of the statutory scheme; they transcend both the public and private facets of the statute. Accordingly, the Chamber submits that the questions raised by the petition are of compelling national concern calling for the presentation of its views to this Court.

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8. The protection afforded by a permanent injunction to an employer unlawfully picketed by a union is more illusory than real. The length of time required for the Board to investigate the employer's charge and to issue a complaint, for the Board Trial Examiner and the Board itself then to rule on the complaint and, subsequently, for a Court of Appeals to enforce any resultant Board order largely negates the value to the picketed employer of such a proceeding. In *Sears, supra*, for example, the union commenced its picketing of Sears on August 7, 1968; only recently, the Tenth Circuit Court of Appeals issued its order remanding the case back to the Board for additional findings. *Carpet Layers Local 419* v. *NLRB* (*Sears, Roebuck & Co.*), ... F. 2d ....., 74 LRRM 2444 (D.C. Cir., 1970). Thus, in excess of two years will have elapsed before that case is resolved. Few employers could withstand a secondary boycott of such a duration. Nor can it be said that the delay involved in the *Sears* case is the unusual situation in that respect. See footnote 8 at page 10 of the Petition for Rehearing in *Sears, supra*.

REASONS FOR GRANTING THE WRIT.

1. The Present Case Raises Significant Issues Regarding the Administration of the Act Which Should be Resolved by This Court in the Exercise of Its "General Power to Supervise the Administration of Justice in the Federal Courts." Western Pacific R. Corp. v. Western Pacific R. Co., 345 U. S. 247, 260.

This Court has determined that "both the successful charging party (in *Scofield*) and the successful charging party (in *Fafnir*) have a right to intervene in a Court of Appeals proceeding which reviews or enforces Labor Board orders." *United Auto Workers* v. *Scofield*, 382 U. S. 205, 208. This Court has not, however, determined the corollary and equally important extent to which charging parties may participate in proceedings instituted by the Board for temporary injunctive relief or may participate in subsequent appellate review in such proceedings. Accordingly, numerous and divergent rulings have emerged from the courts of appeal concerning this and related questions. For example, left unanswered by the Court is the significant issue as to the right of charging parties to participate in district court proceedings as parties.[9]

The Ninth Circuit, on the other hand, affirmed the issuance of an injunction under Section 10(l) at the urging of the charging party and over the objection of the Board where the charging party "merely supported the original petition for injunctive relief requested by the Regional

9. *Samhoff* v. *International Association of Machinists, District Lodge No. 1 (Terminal Handling Co.)*, No. 1481, *cert. den.* June 16, 1970, 38 U. S. L. W. 3497. In this case the Third Circuit refused to accord the charging party the status of a "party" and thus refused to afford it the right to object to a proffered Board stipulation.

Director."[10] And in *Sears, Roebuck and Co., supra,* the Tenth Circuit denied the charging party the right to appeal the denial of an injunction by the district court in a 10(l) proceeding. However, contrary to the holding of the lower court in this case, the Second and Sixth Circuits have apparently permitted intervention of the charging party in an appeal of the district court's rulings in 10(l) proceedings. *McLeod* v. *General Electric Co.,* 366 F. 2d 847 (2nd Cir., 1966); *N. L. R. B.* v. *Nashville Building & Construction Trades Council,* 383 F. 2d 562 (6th Cir., 1967). In light of the recurrent nature of these issues and the divergent approaches of the various circuit courts, it is submitted that the Court should grant the petition herein and resolve the highly significant questions presented.

2. The Decision Below Denies the Charging Party Rights Conferred by the Act.

Section 10(l) of the Act expressly provides that charging parties shall be given notice of the filing of a petition for 10(l) relief and "shall be given an opportunity to appear by counsel and present any relevant testimony." This clear congressional acknowledgement of the charging parties' right to participate in such proceedings only underscores this Court's holding in *Scofield, supra,* that the private interests of charging parties cannot be divorced from the overall statutory scheme.

In expressly conferring these participatory rights, Congress must have intended that the charging party also have the right to seek judicial review. Otherwise, the lower court's denial of an injunction, based, for example, on an improper ruling as to the admissibility of the charging party's evidence would completely frustrate the statutory scheme.

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10. *Retail Clerks Union, Local 137* v. *Food Employers Council,* 351 F. 2d 525 (9th Cir., 1965).

The correctness of the foregoing conclusion is supported by the fact that this Court has understandably been sensitive to the procedural rights of private parties in Board and Board-related proceedings,[11] as well as to the rights of private parties in administrative proceedings generally.[12] Moreover, there is no reasonable predicate for allowing the intervention of charging parties, successful or not, at the appellate stage of an unfair labor practice proceeding, as was done in *Scofield*, but denying charging parties the right to intervene at the appellate stage of litigation under another closely related subsection of the same statutory provision—as was done by the court below in this case. Absent clear congressional intent to the contrary, it must be said that Congress intended the parties to have the same procedural rights regardless of what section of the Act was involved in the particular proceedings.[13]

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11. *United Automobile Workers v. Scofield (Fafnir Bearing Co.)*, 382 U. S. 250.

12. See *Association of Data Processing Service Organization, Inc.* v. *Camp*, ... U. S. ....., 25 L. Ed. 2d, 184 (March 3, 1970) and *Barlow* v. *Collins*, ... U. S. ....., 25 L. Ed. 2d 192 (March 3, 1970).

13. As Professor Jaffe observed:

> "The union [in *Scofield*] suggested that if allowed to intervene it could seek Supreme Court review of an adverse decision though the Board were indifferent or opposed. And why not? *If the statute allows a party to appeal from an adverse Board decision why not from an adverse judicial ruling?* I am not a friend to loose intervention practices, to practices which threaten to encumber administrative hearings and judicial review. *But the interest of a charging party—as the statute itself makes clear—is central to the whole proceeding. To allow intervention merely accords to that interest a customary protection.*". Jaffe, *Judicial Control of Administrative Action*, p. 545 (1965) (emphasis supplied; footnote omitted).

3. The Decision of the Lower Court Hinders the Public Interest by Suppressing Evidence and Argument Before the Courts in 10(l) Proceedings.

It is submitted that if the decision of the lower court is allowed to stand, one of the essential objectives of the Act will be frustrated to the detriment of the public interest. Congress entrusted the keys of the closely-guarded labor injunction to the federal district courts in much the same fashion that enforcement of Board orders was reposed in the courts of appeal. That grant of judicial authority was predicated upon the explicit premise that all parties would have unrestricted opportunity to inform the court, by evidence and argument, of all relevant considerations in a given case. This division of responsibility was acknowledged by the Board and expressly recognized by the Court in *Scofield* where it was stated:

> "In fact, the Labor Board itself agrees that intervention by charged parties will not impair effective discharge of its duties and may well promote the public interest . . . Participation in defining the issues before the court guarantees that all relevant material is brought to its attention, and makes the briefs on the merits more meaningful."

There can be no logical reason for applying the *Scofield* doctrine to one stage of an unfair labor practice proceeding but refusing, as did the court below, to apply it to the closely-related injunction sections regarding secondary boycotts. If anything, the more logical postulate is that Congress wanted the fullest possible exposure of facts and arguments in light of the limited time available to the court for consideration of its ruling in a 10(l) proceeding and the overriding concern of Congress regarding this particular violation. Thus, the decision of the court below denying the charging party rights of intervention is clearly

contrary to the public interest facet of the statutory scheme and, accordingly, review by this Court is fully warranted.

4. The Decision of the Court Below Departs From the Better-Reasoned Precedent.

The Ninth Circuit Court of Appeals did not set forth the reasons which prompted it to hold that petitioner herein did not have the right to intervene in the Regional Director's appeal of the trial court's ruling. This approach must indicate, *sub silentio*, that the court below views its earlier decision in *Retail Clerk's Union* v. *Food Employers Council*, 351 F. 2d 525 (9th Cir., 1965) as limiting the participatory rights of a charging party to the district court stage of the litigation, as did the Tenth Circuit in *Sears, Roebuck & Co., supra.* However, no such restriction of the charging parties' essential procedural rights under Section 10(l) was set forth in the court's opinion in *Retail Clerk's, supra.* Moreover, the Ninth Circuit Court's rationale as set forth in the earlier *Retail Clerk's* case fully and logically supports the position of the petitioner here. In that decision, the court below reasoned that since the charging party was only attempting to "support the position of the Regional Director" and was not seeking to "initiate the litigation," the Norris-LaGuardia Act was no obstacle. Here also, the petitioner is merely seeking to support the position of the Regional Director who has initiated the appeal and the Norris-LaGuardia Act should not be read as obstructing such participation.

Review is warranted here for the additional reason that, as the Court held in *Boys Markets* v. *Clerk's Union*, No. 768, October Term, 1969, the earlier enacted provisions of the Norris-LaGuardia Act must be accommodated to the subsequent amendments to the National Labor Relations

Act. In enacting Section 10(l), Congress expressed a clear purpose of protecting the neutral employer from the disruptive effects of unlawful secondary boycotts. The participatory rights granted neutral employers by the explicit terms of Section 10(l) reflects the judgment of Congress that the prosecutorial efforts of the Board's General Counsel alone would not guarantee such protection. As in *Boys Markets*, the earlier enacted provisions of the Norris-LaGuardia Act cannot be interpreted here as overriding this clear congressional objection by stifling the neutral employer's right to participate at all stages of 10(l) injunctive proceedings. Rather, as the Court said in *Boys Markets*, it is "the task of the courts to accommodate, to reconcile the older statutes with the more recent ones." The court below failed to reach such an accommodation, and, accordingly, review by this Court is warranted.

CONCLUSION.

For the foregoing reasons, the Chamber urges this Court to grant the Petition for Writ of Certiorari.

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IN THE

Supreme Court of the United States

October Term, 1970
No. 350

LOS ANGELES HERALD-EXAMINER, Division of The Hearst Corporation, and THE SAN FRANCISCO EXAMINER, Division of The Hearst Corporation,
Petitioners,

vs.

RALPH E. KENNEDY, Regional Director of Region 21 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, appellant in proceedings before the United States Court of Appeals for the Ninth Circuit,
Respondent,

SAN FRANCISCO-OAKLAND NEWSPAPER GUILD; NEWSPAPER AND PERIODICAL DRIVERS' AND HELPERS' UNION LOCAL 921; LOS ANGELES NEWSPAPER GUILD, LOCAL 69; LOS ANGELES WEB PRESSMEN'S UNION NO. 18; LOS ANGELES STEREOTYPERS' UNION NO. 58; LOS ANGELES TYPOGRAPHICAL UNION NO. 174; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE NO. 94; GENERAL WAREHOUSEMEN'S UNION LOCAL 598; BUILDING SERVICE AND MAINTENANCE EMPLOYEES UNION NO. 399; LOS ANGELES MAILERS UNION NO. 9; and LOS ANGELES PAPER HANDLERS' UNION NO. 3, appellees in proceedings before the United States Court of Appeals for the Ninth Circuit,
Respondents.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

Supreme Court of the United States

October Term, 1970
No. 350

LOS ANGELES HERALD-EXAMINER, Division of The Hearst Corporation, and THE SAN FRANCISCO EXAMINER, Division of The Hearst Corporation,

Petitioners,

vs.

RALPH E. KENNEDY, Regional Director of Region 21 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, appellant in proceedings before the United States Court of Appeals for the Ninth Circuit,

Respondent,

SAN FRANCISCO-OAKLAND NEWSPAPER GUILD; NEWSPAPER AND PERIODICAL DRIVERS' AND HELPERS' UNION LOCAL 921; LOS ANGELES NEWSPAPER GUILD, LOCAL 69; LOS ANGELES WEB PRESSMEN'S UNION NO. 18; LOS ANGELES STEREOTYPERS' UNION NO. 58; LOS ANGELES TYPOGRAPHICAL UNION NO. 174; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE NO. 94; GENERAL WAREHOUSEMEN'S UNION LOCAL 598; BUILDING SERVICE AND MAINTENANCE EMPLOYEES UNION NO. 399; LOS ANGELES MAILERS UNION NO. 9; and LOS ANGELES PAPER HANDLERS' UNION NO. 3, appellees in proceedings before the United States Court of Appeals for the Ninth Circuit,

Respondents.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respondents, San Francisco-Oakland Newspaper Guild, Newspaper and Periodical Drivers' and Helpers' Union Local 921, Los Angeles Newspaper Guild, Local 69, Los Angeles Web Pressmen's Union No. 18, Los Angeles Stereotyper's Union No. 58, Los Angeles Typographical Union No. 174, International Association of Machinists and Aerospace Workers, District Lodge

No. 94, General Warehousemen's Union Local 598, Building Service and Maintenance Employees Union No. 399, Los Angeles Mailers' Union No. 9, and Los Angeles Paper Handlers' Union No. 3, hereinafter referred to as "Respondent Unions", pray that the petition for a writ of certiorari to review the orders of the United States Court of Appeals for the Ninth Circuit dismissing petitioners' appeal and denying petitioners' motion to intervene, be denied.

Questions Presented.

1. Does a charging party in proceedings instituted by the National Labor Relations Board pursuant to Section 10(1) of the National Labor Relations Act, as amended, 29 U.S.C., section 160(1), have standing to appeal from a decision of the district court where the National Labor Relations Board has appealed from that decision and is prosecuting the appeal?

2. Does a charging party, in proceedings instituted by the National Labor Relations Board pursuant to Section 10(1) of the National Labor Relations Act, as amended, 29 U.S.C., Section 160(1), have an absolute right to intervene as a party in an appeal from the decision of the district court filed by the National Labor Relations Board where the charging party's position on the appeal is being prosecuted by the National Labor Relations Board and where the charging party has been afforded the opportunity to appear as an *amicus curiae*, to file a brief, and to argue orally?

Statute Involved.

Section 10(1) of the National Labor Relations Act, as amended, 29 U.S.C., Section 160(1), provides in relevant part:

> "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 8(b) or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States . . . for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law. . . . Upon filing of any petition the court shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony. . . ."

Statement of the Case.

On January 12, 1968, respondent Ralph E. Kennedy, Regional Director of Region 21 of the National Labor Relations Board, hereinafter referred to as "Respondent Regional Director", filed a petition for injunction under Section 10(1) of the National Labor Relations Act (29 U.S.C., Section 160(1)), in the United States District Court, Northern District of California, alleging that petitioners herein had filed unfair labor practice charges with the National Labor Relations Board, charging that respondent unions were engaging in activity in violation of Section 8(b)(4)(i)(ii)(B) of the Act (29 U.S.C., Section 158(b)(4)(i)(ii)(B)), further alleging that respondent Regional Director had reasonable cause to believe that respondent unions had engaged in the unfair labor practices charged, and requesting a temporary injunction pending final disposition by the Board of said unfair labor practice charges. The district court issued an order on February 7, 1968 and a supplemental order on February 8, 1968, granting the temporary injunction requested by respondent Regional Director.

Respondent unions appealed to the Court of Appeals for the Ninth Circuit, seeking a reversal of the judgment of the district court. Petitioners, charging parties below, filed a motion for leave to intervene in the proceedings. On May 20, 1968, the Court of Appeals denied petitioners leave to intervene but permitted them to appear and file a brief as *amici curiae*. Petitioners

petitioned this Court for a writ of certiorari on the denial of their motion to intervene, but certiorari was denied. 393 U.S. 926 (1968). Petitioners participated as *amici curiae* in the proceeding on the merits before the Court of Appeals and on June 4, 1969, the Court of Appeals affirmed the decision of the district court. *San Francisco-Oakland Newspaper Guild, et al. v. Kennedy,* 412 F. 2d 541 (9th Cir., 1969).

On February 20, 1970, respondent unions moved the district court to dissolve the temporary injunctions granted on February 7 and 8, 1968, on the grounds that said temporary injunctions had been in effect for more than a reasonable period of time and that it was no longer just and proper to maintain them in effect. On April 6, 1970, after consideration of affidavits, memoranda of points and authorities, and oral argument, the district court dissolved said temporary injunctions, concluding that they had been in effect for more than a reasonable period of time and that it was no longer just and proper to maintain them in effect. That same day, Respondent Regional Director and petitioners filed separate notices of appeals and requests for stays of the district court's order. On April 14, 1970, the Court of Appeals granted the petitioners' motion for a stay of the district court's order pending appeal. On May 19, 1970, however, on reconsideration, the Court of Appeals vacated its order of April 14, 1970, granted Respondent Regional Director's motion to dismiss petitioners' appeal, which motion was based

on petitioners' lack of standing to appeal, and granted Respondent Regional Director's motion for a stay of the district court's order pending determination of Respondent Regional Director's appeal (Cause No. 25,656).

Following the dismissal of their appeal, petitioners sought leave to intervene on Respondent Regional Director's appeal (Cause No. 25,656). On June 15, 1970, the Court of Appeals denied leave to intervene. On June 26, 1970, the Court of Appeals granted petitioners *amici curiae* status, as well as the right to file a brief and to share in the argument time of Respondent Regional Director. Briefs on the merits of the appeal were filed by Respondent Regional Director (appellant), respondent unions (appellees), and petitioners (*amici curiae*). Oral argument on the merits was held on July 8, 1970. Petitioners participated in the oral argument, sharing equally with Respondent Regional Director the time alloted to the appellant for argument. During oral argument, petitioners, for the first time, raised the argument that respondent unions could have availed themselves of an alleged alternative remedy, *i.e.*, writ of mandamus against the Board; petitioners had not raised this issue in the district court nor in their brief to the Court of Appeals. The appeal has been taken under submission by the Court of Appeals.

REASONS FOR DENYING THE PETITION.

1. The Petition Does Not Present Important or Substantial Questions Which Should Be Considered by This Court and This Is Not an Appropriate Case for Consideration of the Issues Raised.

The petition presents two questions relating to the rights of charging parties to participate in appellate proceedings arising out of Section 10(1) proceedings instituted by the National Labor Relations Board. The questions raise narrow, peripheral, insignificant issues unrelated to the substantive provisions of Section 10(1). Moreover the insignificance of the questions presented becomes even more apparent when we consider the paucity of Section 10(1) appeals which reach the courts of appeals.

A review of volumes 398 to 412, inclusive, of the Federal Reporter, 2d series, encompassing roughly a twelve month period from approximately July 1, 1968 to June 30, 1969, discloses only three court of appeals decisions in Section 10(1) cases and none in Section 10(j) cases. Similarly, a review of volumes 380 to 397, inclusive, of the Federal Reporter, 2d series, encompassing roughly a twelve month period from approximately July 1, 1967 to June 30, 1968, discloses only one court of appeals decision in a Section 10(1) case and two in Section 10(j) cases.

The small number of Sections 10(1) and 10(j) cases which reach the courts of appeals is, of course, a direct result of the nature of these proceedings. Under Section 10(1) the National Labor Relations Board is authorized to seek preliminary injunctive relief against certain specified types of unfair labor practices pending a decision by the Board on the merits of the charges.

Section 10(j) is an analogous provision authorizing preliminary injunctive relief in other cases where it is necessary. Preliminary relief under Section 10(j) or 10(l) is sought by the Board in only a small percentage of its cases. Since the relief is *pendente lite*, only a few of these Section 10(l) or 10(j) cases ever reach the courts of appeal, and even fewer are decided by the courts of appeals.

It becomes even more apparent that there is only a *de minimus* number of Section 10(l) appeal cases decided by the courts of appeals when we contrast the number of Section 10(l) appeal cases (three in one year and one in another) with the three hundred and one enforcement and/or review proceedings under Sections 10(e) and (f) of the Act decided by courts of appeal during fiscal years 1968, as reported in the Thirty-Third Annual Report of the National Labor Relations Board, Appendix A, Tables 19 and 19A, pp. 240-241.*

Thus, exceedingly few Sections 10(l) or 10(j) appeals are decided by the courts of appeals, and, quite obviously, the question of intervention or standing of a

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*Sections 10(e) and (f) provide for enforcement and/or review of all final decisions of the Board. The proceedings arise after a full hearing and decision on the merits by the Board; the courts of appeals' decisions are, of course, final decisions on the merits. Courts of Appeal consider large numbers of such cases each year. In *Intl. Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Local 283 v. Scofield*, 382 U.S. 205 (1965), relied on by petitioners herein, this Court considered the rights of successful charged and charging parties to intervene in Sections 10(e) and (f) proceedings. The questions considered the *Scofield*, unlike the questions presented here, involved the right to participate in review and enforcement proceedings on the merits, after having participated as a party in the Board proceeding on the merits, and involved Sections 10(e) and (f) proceedings which are before courts of appeals on a frequent and regular basis.

charging party is involved even less frequently. Some charging parties undoubtedly do not participate at all and others are not concerned with becoming full parties.

Despite the exceedingly small number of Section 10(l) cases decided by the courts of appeals, this Court recently granted certiorari in *Sears, Roebuck & Co. v. Local 419, Carpet Layers*, ... U.S. ....., 90 S. Ct. 1299 (1970), a Section 10(l) case in which the standing of a charging party to appeal was raised. Petitioners argue that the issue raised in *Sears, Roebuck* is identical to the first question presented herein—whether charging parties have standing to appeal from a district court decision in a Section 10(l) proceeding. The issue raised in *Sears, Roebuck*, however, went far beyond the limited questions presented here, for *Sears, Roebuck*, unlike the instant case, involved an attempt by an interested person to appeal and to pursue litigation when the government agency charged with responsibility in the matter had refused to act. Quite obviously, the issue in *Sears, Roebuck* had ramifications beyond Section 10(l) and beyond the National Labor Relations Act, and involved a question of the right of a private party to take action which is normally within the province of a federal agency, when the federal agency has chosen not to take action.

In *Sears, Roebuck*, the National Labor Relations Board had chosen not to appeal from an adverse decision of the district court and the charging party had attempted to do what the Board would not. The court of appeals dismissed the appeal filed by the charging party, leaving no appeal of the adverse district court decision. The court of appeals' dismissal of the charging party's appeal in *Sears, Roebuck* terminated all litiga-

tion in the injunction proceeding, and left the charging party without a temporary injunction, without a forum to question the correctness of the district court's decision, without an opportunity to present its position or to have its position presented to a court of appeals, and without a court of appeals decision on the merits.

In the instant case, the National Labor Relations Board has appealed from the decision of the district court, has fully prosecuted that appeal, and has fully protected the interests of the charging parties. Indeed, on the same day that the charging parties filed a notice of appeal and a request for a stay of the district court order, the Board also filed a notice of appeal and a request for a stay. The Board obtained the stay, filed a brief on the merits and argued orally before the court of appeals; the appeal has been taken under submission and there is absolutely no indication that the Board is even considering dropping the appeal. On the contrary, the Board has vigorously prosecuted the appeal at all stages, and fully represented the charging parties' interests. Moreover, the charging parties have fully participated in the appeal, have filed a brief on the merits, have argued orally, and have been afforded the opportunity to present any argument they chose to raise. The dismissal of the charging parties' appeal by the Ninth Circuit herein, unlike the dismissal of the charging party's appeal by the Tenth Circuit in *Sears, Roebuck*, will have no impact whatsoever on the court's decision on the merits, and no effect whatsoever on the presentation of charging parties' position.

Assuming, *arguendo*, that the question presented in *Sears, Roebuck* was a substantial or important question

in the context of that case, it is clear that the question of the standing of petitioners herein to appeal is insignificant and academic. Under these circumstances, respondent unions respectfully submit that the question of the standing of charging parties in the instant case to appeal from the decision of the district court is not sufficiently important for consideration by this Court, and that this is not an appropriate case for consideration of the issue raised.

The second question presented by the petitioners raises the issue of a charging party's right to intervene in an appeal of a district court decision under Section 10(1) of the Act. This Court, of course, previously denied certiorari to these same petitioners on the identical issue when they sought to intervene in an earlier appeal to the Ninth Circuit in the instant Section 10(1) proceeding. 393 U.S. 926 (1968).

Petitioners again argue here, as they did in 1968, that the decision of the Ninth Circuit denying them leave to intervene is in conflict with this Court's decision in *Intl. Union, United Automobile, Aereospace & Agricultural Implement Workers of America, Local 283 v. Scofield*, 382 U.S. 205 (1965). As we shall demonstrate, *infra*, the decision of the Ninth Circuit in no way conflicts with this Court's decision in *Scofield*, and is the appropriate and correct decision under the statutory framework of Section 10(1) of the Act. As will be discussed *infra*, *Scofield* involved questions of participation and rights of charging and charged parties in enforcement and review proceedings under Section 10(e) and (f) of the Act following a full hearing and final decision by the Board on the merits of the case. The questions raised in *Scofield* involved an entirely differ-

ent statutory scheme from that involved herein, with entirely different practical and legal considerations, and an entirely different legislative intent and totally different policy considerations.

Scofield involved substantial and important questions, but the questions raised here, while falling within the same broad area of charging parties' rights, arise in the context of temporary, interim injunctive relief under Section 10(1) of the Act and are insignificant in the framework of federal labor policy. The question of a charging party's right to intervene in a Section 10(1) appeal is particularly insignificant where, as here, the charging party has been afforded *amicus curiae* status, has filed a brief on the merits with the court of appeals, and has argued orally.'

As we have demonstrated above, courts of appeals decide a substantial number of Section 10(e) and (f) proceedings—the type of proceedings involved in *Scofield*—each year. During fiscal 1968, three hundred and one such cases where decided by the courts of appeals. Section 10(1) cases, however, are decided only infrequently by the courts of appeal. Only four such cases appear in the Federal Reporter volumes covering roughly a two year period from July 1, 1967 to June 30, 1969.

Petitioners, in attempting to overcome the lack of importance of the questions they have presented, argue that there are issues they might present which the Board would not or could not present. In particular, petitioners point to an argument regarding an alleged alternative remedy which respondent unions could have utilized, *i.e.*, writ of mandamus against the Board. Petitioners' contentions here with respect to that argu-

ment are, however, highly misleading. Petitioners did not raise that argument themselves in the district court, although they fully participated in the district court proceedings, nor in their brief on the merits to the court of appeals. Petitioners first raised the issue in oral argument to the courts of appeals. In any event, they were permitted to present their arguments on this issue at that time.

Furthermore, this is not an appropriate case for consideration of the question presented since the identical question of these charging parties' right to intervene was finally determined against the petitioners two years ago, and certiorari was denied on this issue. 393 U.S. 926 (1968). The law of this case on the question presented has, therefore, been previously decided finally against petitioners and they cannot now raise the question again in this case.

Petitioners' earlier motion to intervene was denied by the Ninth Circuit in an earlier appeal in the instant case. That first appeal involved the same parties and the same temporary injunctions as are involved in the current appeal. The issue in the first appeal was whether the temporary injunctions against respondent unions had been properly granted and should remain in effect; the issue in the current appeal is whether those same temporary injunctions should still be maintained in effect two years later. The interests of the respective parties in the first appeal were identical to their respective interests in the current appeal; in both appeals petitioners and Respondent Regional Director sought to maintain the temporary injunctions in effect and respondent unions sought to terminate said injunctions. The question of petitioners' right to intervene before the

Court of Appeals in this case was finally determined against them two years ago in the first appeal. Thus, the instant petition constitutes merely one further attempt to intervene on the same grounds in the same case, even though that issue has previously been finally resolved against petitioners.

Clearly the questions presented here, are relatively insignificant questions, having little or no importance in the spectrum of federal labor policy. Respondent unions respectfully submit that this petition does not present substantial or important questions worthy of consideration by this Court and that, in any event, this case is not an appropriate one for consideration of the issues raised.

2. The Orders of the Court of Appeals Dismissing Petitioners' Appeal and Denying Petitioners Leave to Intervene in Respondent Regional Director's Appeal of the District Court's Order Dissolving the Temporary Injunctions Issued Under Section 10(1) of the Act Are Not in Conflict With This Court's Decision in Intl. Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Local 283 v. Scofield, 382 U.S. 205 (1965).

In *Scofield,* this Court held that charging parties and charged parties in unfair labor practice proceedings before the National Labor Relations Board have a right to intervene in the court of appeals in proceedings reviewing an NLRB order under Section 10(e) and (f) of the National Labor Relations Act (29 U.S.C., Section 160(e) and (f)). Petitioners contend that the Ninth Circuit's order in this proceeding denying them the right to intervene in an appeal of an order issued by the district court under Section 10(1) of the National

Labor Relations Act is in conflict with this Court's decision in *Scofield,* and attempt to analogize proceedings under Section 10(1) to proceedings under Section 10(e) and (f). It is clear, however, that this Court's decision in *Scofield* is inapplicable to the questions presented here.

In *Scofield,* this Court was careful to confine the scope of its ruling to the question of intervention in the courts of appeals in NLRB review proceedings under Section 10(e) and (f).

> "Lacking a clear directive on the subject, we look to the statutory design of the Act. Cf. *Scripps-Howard Radio v. Commission,* 316 U.S. 4, 11, 62 S. Ct. 875, 86 L. Ed. 1229. Of course, in considering the propriety of intervention in the courts of appeals, our discussion is limited to Labor Board *review* proceedings. Federal agencies are not fungibles for intervention purposes—Congress has treated the matter with attention to the particular statutory scheme and agency. . . ." (382 U.S. at 210). (Emphasis added).

In *Scofield,* this Court relied heavily upon the statutory scheme of Section 10(e) and (f), a statutory scheme wholly different from that contained in Section 10(1). In particular, this Court relied upon the fact that the charging party is a full party in the Board proceedings which are being reviewed and that Section 10(f), unlike Section 10(1), provides that "any person aggrieved by a final order of the Board . . . may obtain review of such order. . . ."

Moreover, the rationale of this Court in *Scofield* in allowing intervention in review proceedings is wholly

inapplicable to proceedings under Section 10(1) of the Act. As this Court pointed out, any party aggrieved by a Board order may seek review of that order and if a successful charging party or charged party is not allowed to intervene in the first appellate review proceeding, there is a possibility of a remand to the Board followed by a ruling against the previously successful party with the attendant possibility of a second appeal to the court of appeals by the party which was not permitted to intervene in the original appellate review proceeding. Thus, denying intervention to a successful charging party or charged party in the first appellate review proceeding may lead to undesirable duplication of proceedings and "circuit shopping". 382 U.S. at 212-213, 222, fn. 20.

It is clear that the considerations which warrant intervention in enforcement and review proceedings under Section 10(e) and (f) do not exist in proceedings under Section 10(1). Under Section 10(1) there is no possibility of duplication of proceedings which might result from the denial of intervention. If the charging parties are not permitted to intervene in the proceedings in a Section 10(1) appeal, and if there is a remand to the district court with a subsequent ruling in favor of appellants, charging parties will not have the opportunity to review this ruling in a subsequent appeal, as would be the case under Section 10(e) and (f). The problem considered by this Court in *Scofield* was that charged parties and charging parties who were not allowed to intervene in the first appellate proceeding might subsequently have a right to bring an appeal themselves as aggrieved persons. This problem simply does not exist under Section 10(1).

In short, the question of intervention in proceedings on a Section 10(1) appeal is an entirely different question from that considered by this Court in *Scofield* with respect to intervention in review and enforcement proceedings under Section 10(e) and (f). Thus, the order of the Court of Appeals denying intervention in the instant proceeding is not in conflict with this Court's decision in *Scofield*.

Moreover, as we shall demonstrate *infra*, there are a number of compelling policy reasons for denying charging parties status as full parties in Section 10(1) proceedings. It is clear that in Section 10(1), unlike Section 10(e) and (f), Congress intended to limit and restrict the rights of charging parties, and did in fact do so.

3. The Order of the Court Below Is Consistent With the Letter and Spirit of Section 10(1) and With the Intent of Congress in the Norris-LaGuardia Act and the National Labor Relations Act, and Permits Charging Parties to Participate in the Section 10(1) Proceeding to the Full Extent Intended by Congress.

Congress, in enacting Section 10(1) of the Act, provided for interim injunctive relief with respect to certain kinds of unfair labor practices. Congress sought to protect the public interest, but also carefully spelled out the rights of the private parties involved in the labor dispute. Cognizant of the odious history of the *ex parte* labor injunction and of the fact that private litigants involved in a labor dispute could not be expected to afford one another just treatment in an injunction proceeding, and yet mindful of the importance of time, Congress provided for an expedited procedure but limi-

ted the length of time a temporary restraining order could remain in effect, and gave to the National Labor Relations Board the authority to institute and prosecute the proceedings, while spelling out in detail the rights of private parties to ensure that the interests of respondents, as well as charging parties, are fully protected.

In a careful balancing of interests, Congress specifically limited the rights of the charging party. It was clearly the intent of Congress to preclude private parties from seeking or obtaining injunctive relief under Section 10(1). Nor did Congress intend that private parties should be permitted to intervene or to appeal and seek an injunction from a higher court which they could not have sought or obtained from the lower court. Rather, Congress chose to protect the public interest, while at the same time protecting the interests of respondent and charging party, by providing the charging party with certain specific rights, *i.e.*, the right to appear and present relevant testimony.

In Sections 10(j) and 10(l) of the Act, Congress enacted a narrow exception to the prohibitions of the Norris-LaGuardia Act (29 U.S.C., Section 101, *et seq.*), against temporary injunctive relief in labor disputes. It is well settled that this narrow exception, removing the limitations of the Norris-LaGuardia Act upon the power to issue labor injunctions, was applicable only where the administrative agency entrusted with the enforcement of the Act, the National Labor Relations Board, seeks the injunction, not where it is sought by a private party. *Bakery Sales Drivers Local Union No. 33 v. Wagshal*, 333 U.S. 437 (1948); *Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S. 452, 517 (1955).

Petitioners argue that Section 10(h) of the Act excepts all proceedings under Section 10 from the provisions of the Norris-LaGuardia Act. It is clear, however, that in Section 10 of the National Labor Relations Act Congress carved out certain express exceptions to the provisions of Norris-LaGuardia, and that Congress intended to create no other exceptions than those specifically set forth in Section 10(1). As the Fourth Circuit said in *Amazon Cotton Mill*, 167 F. 2d 183 (4th Cir., 1948), quoting the language of this Court in *General Committee v. Missouri K.T.R. Co.*, 320 U.S. 323, 332 (1943), and applying it to the National Labor Relations Act:

> "On only certain phases of this controversial subject has Congress utilized administrative or judicial machinery and invoked the compulsions of the law. Congress was dealing with a subject highly charged with emotion. Its approach has not only been slow; it has been piecemeal. Congress has been highly selective in its use of legal machinery. The delicacy of these problems has made it hesitant to go too fast or too far. The inference is strong that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate." (157 F. 2d at 186).

The rights of parties to participate in various proceedings are spelled out in detail in Section 10 of the Act, and Congress clearly chose to set forth wholly different procedural rules under Section 10(1) from those established with respect to proceedings before the Board and subsequent review or enforcement proceedings. Section 10(1) provides that the charging party shall be

given an opportunity to appear by counsel and present any relevant testimony in the proceedings for a temporary injunction. It does not provide that the charging party may intervene in such proceedings or that he may become a party to the proceedings. In Section 10(b), 29 U.S.C., Section 160(b), however, Congress specifically provided for intervention in the Board proceeding on the merits. And, as this Court pointed out in *Scofield, supra,* the charging party is accorded formal recognition in the Board proceeding; he participates in the hearing as a "party" and he may file exceptions to any order of the trial examiner.

Similarly, Section 10(1), unlike Section 10(f), does not provide that any person aggrieved by a decision can seek review.

It was not by accident that Congress provided for varying degrees of participation on the part of charging parties. The review proceedings contemplated under Section 10(e) and (f) of the Act follow a full hearing on the merits before the Board with all parties participating. In a Section 10(e) and (f) proceeding the findings of the Board must be supported by substantial evidence on the record considered as a whole. Section 10(1) provides for interim relief, a temporary restraining order and/or a preliminary injunction after a preliminary investigation by the Board but prior to any hearing on the merits. The petitioning Regional Director under Section 10(1) must show only that there is reasonable cause to believe that a violation of the Act has occurred.

The limitation on participation of charging parties in preliminary Section 10(1) proceedings, prior to a Board decision on the merits, is also necessary because

of the importance of time when a preliminary labor injunction is at issue. Obviously, the injunction is of critical importance in a labor dispute, and once an injunction has been issued time is of the essence to the respondent. As we have demonstrated, *supra,* Congress was fully aware that time was often of critical importance to all parties, and therefore provided for an expedited procedure and also limited the period of time a temporary restraining order could remain in effect.

Respondents' interests in speedy resolution of the case were further protected by limiting the parties to the Board and respondent, and by not affording the charging party full status as a party. If an injunction issues, and respondent chooses to appeal, he is, of course, interested in obtaining a decision on appeal as quickly as possible, since time is usually of the essence. Public policy also favors a quick decision, for if the injunction was granted erroneously, it should be removed as quickly as possible in light of its critical importance in the labor dispute. The Regional Director, acting in the public interest, would undoubtedly present no unreasonable roadblock to a quick decision. The charging party, however, is in no hurry to obtain a decision once there is an injunction in effect. If the charging party were a full party, it might well be able to dictate and control the course of litigation, not in the public interest, and not in accordance with Congressional intent, but solely in its own interest, and respondents might well be deprived of the opportunity to have their appeal heard at a time when it still made some practical difference.

Congress intended to limit the rights of charging parties to participate in Section 10(1) proceedings,

and did in fact do so. Congress has precluded private parties from seeking or obtaining temporary injunctive relief under Section 10(l). It was not the intent of Congress to allow a private litigant to appeal and seek an injunction from a higher court which only the Board could seek below, or to permit a charging party to intervene and become a full party with the power to dictate the course of litigation in Section 10(l) proceedings.

The decisions of the Ninth Circuit dismissing petitioners' appeal and denying petitioners the right to intervene in this proceeding properly limit the participation of private litigants in Section 10(l) proceedings to the extent intended and expressly provided for by Congress in Section 10(l).

4. There Is No Conflict Among the Courts of Appeal on the Questions Presented.

The Court of Appeals for the Ninth Circuit has considered the question of a charging party's rights on appeal of a district court decision under Section 10(l) on two occasions prior to the instant decisions, and on both occasions the Ninth Circuit concluded that a charging party does not have the right to participate as a full party to such proceedings. *San Francisco-Oakland Newspaper Guild, et al. v. Kennedy*, Docket Nos. 22757-8-9 (9th Cir., May 20, 1968), cert. denied, 393 U.S. 926 (1968); *Henderson v. IUOE, Local 701*, 420 F. 2d 802 (9th Cir., 1969). The Court of Appeals for the Tenth Circuit is in accord. *Sears, Roebuck & Co. v. Local 419, Carpet Layers*, 410 F. 2d 1148 (10th Cir., 1969), dismissed for mootness, ... U.S. ....., 90 S. Ct. 1299 (1970).

Although *amicus curiae* argues that the decisions of the Second Circuit in *McLeod v. General Electric Co.*, 366 F. 2d 847 (2d Cir., 1966), and of the Sixth Circuit in *NLRB v. Nashville Bldg. & Construction Trades Council*, 383 F. 2d 562 (6th Cir., 1967), indicate an approach to the question different from that of the Ninth and Tenth Circuits, it is clear that neither the Second Circuit or Sixth Circuit has ruled upon or even discussed the right of a charging party to intervene, and that there is no decision by a court of appeals in conflict with the decisions of the Ninth and Tenth circuits.

In *McLeod v. General Electric Co.*, 366 F. 2d 847 (2d Cir., 1966), there is neither a holding nor a discussion by the Second Circuit on the issue of intervention by the charging parties. Charging parties' intervention in that case was not opposed and the issue was neither raised nor considered. Moreover, the charging party was not in fact treated as an intervenor since the court granted it only the right to file a brief while denying leave to argue orally.

In *NLRB v. Nashville Bldg. & Const. Trades Council*, 383 F. 2d 562 (6th Cir., 1967), the Sixth Circuit had before it three legal proceedings: an appeal of a temporary injunction granted by the district court under Section 10(1), a petition for writ of mandamus filed by the respondent union, and a petition for enforcement of the final NLRB order on the merits. The court noted at page 563, footnote 1, that the petition of the charging party to intervene "in the enforcement proceedings" was granted, citing *UAW v. Scofield, supra*, but the charging party did not intervene in the appeal of the injunction issued under Section 10(1) even though that proceeding was also before the court.

Thus, there is no conflict among the courts of appeal. The Ninth and Tenth Circuits are in accord that a charging party does not have standing to appeal or the right to intervene; there is no contrary court of appeal decision and no court of appeal has expressed a view in conflict with that of the Ninth and Tenth Circuits.

Conclusion.

For the foregoing reasons, it is respectfully urged that the petition for writ of certiorari should be denied.

Respectfully submitted,

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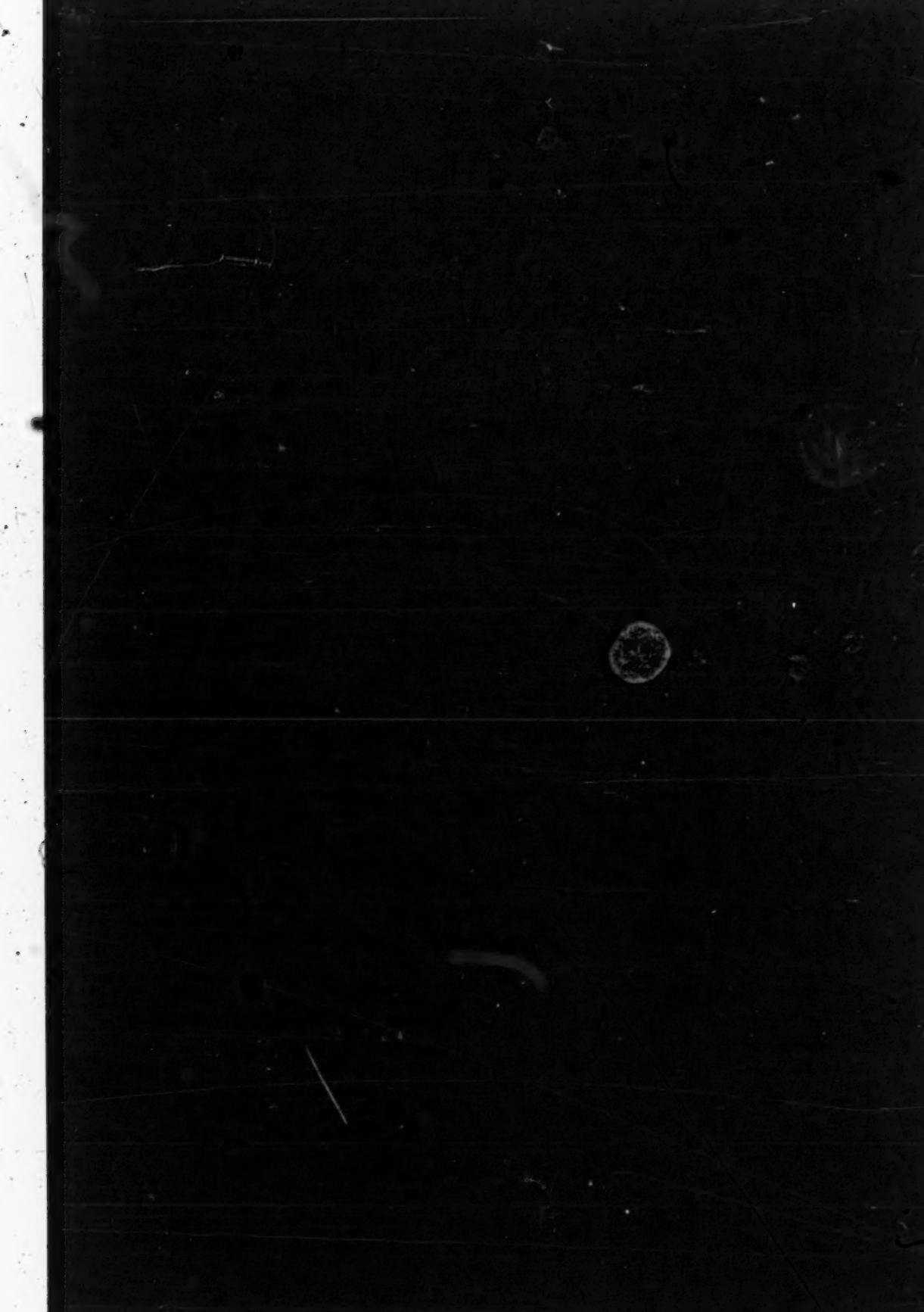
In the Supreme Court of the United States

October Term, 1970



In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 350

THE LOS ANGELES HERALD-EXAMINER, DIVISION OF THE HEARST CORPORATION, ET AL., PETITIONERS

v.

RALPH E. KENNEDY, REGIONAL DIRECTOR OF REGION 21 OF THE NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR RESPONDENT KENNEDY

1. In February 1968, upon the filing of a charge by petitioners that respondent unions were conducting a secondary boycott in violation of Section 8(b)(4)(B) (29 U.S.C. 158(b)(4)(B)) of the National Labor Relations Act, respondent Kennedy, the Board's Regional Director, obtained from the district court, pursuant to Section 10(l) (29 U.S.C. 160(l)) of the Act, an injunction against that activity pending a final determination by the Board (Pet. 4). In April 1970, because the Board had not as yet finally determined the matter, the district court, upon motion of the unions, dissolved the injunction it had previously

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issued (Pet. App. B, 4). The Regional Director appealed and, pending a determination of the appeal, obtained from the court of appeals a stay of the district's court's order dissolving the injunction (Pet. App. A, 2). Petitioners also appealed from the district court's order, but the court of appeals, accepting the contention of the Regional Director and the unions that the charging party was not a party in a Section 10(l) proceeding, dismissed petitioners' appeal and denied them leave to intervene (Pet. App. A, 1, 3). Petitioners, however, were permitted to file a brief *amici curiae,* and participated in the oral argument held on July 8, 1970.

2. The sole question the petition presents is whether the court of appeals correctly denied petitioners the right either to appeal or to intervene as a party in the appeal instituted by the Regional Director.[1] This issue—involving the status of the charging party in the interlocutory injunction proceeding provided for in Section 10(l) of the Act—is the same as that presented in *Sears Roebuck & Co.* v. *Local 419, Carpet Layers Union,* No. 476, O.T., 1969, certiorari granted, 396 U.S. 926; judgment vacated for mootness, 397 U.S. 655. Presumably, the considerations which prompted the Court to grant certiorari in *Sears Roebuck* would be applicable to the present petition.[2]

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[1] On July 8, 1970, Mr. Justice White denied petitioners' application for a stay of the court of appeals proceeding pending a final disposition by this Court of the present petition.

[2] But cf. *Los Angeles Herald-Examiner* v. *San Francisco-Oakland Newspaper Guild,* No. 409, O.T., 1968, certiorari denied, 393 U.S. 926.

3. This case is distinguishable from *Sears Roebuck*, however, because there the district court had denied an injunction, the Regional Director had declined to appeal and the court of appeals had dismissed the charging party's appeal, thereby terminating the appellate proceeding. Here, on the other hand, the Regional Director has appealed the district court's dissolution of the injunction, and petitioners participated in that appeal in a substantial way. Should the court of appeals reverse the district court and continue the injunction in effect, there would be no substantial prejudice to petitioners resulting from denying them the right to appeal or to intervene in the Regional Director's appeal.[3] Petitioners would suffer substantial prejudice only if the court of appeals were to sustain the dissolution of the injunction; because they are not parties to the case, petitioners could not file a petition for a writ of certiorari to review that judgment. But the Regional Director might file a petition; or the Board by then might have decided the underlying unfair labor practice case, in which event the injunction issue would become moot. *Sears Roebuck, supra.* Thus, the court of appeals' ruling of which petitioners here seek review does not

[3] Should the unions file a petition for a writ of certiorari, petitioners could present their opposition thereto only as *amici curiae*.

have the same impact upon the charging party as did the ruling in *Sears Roebuck*.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
National Labor Relations Board.

JULY 1970.

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No. 330

In the Supreme Court of the United States

OCTOBER TERM, 1970

THE LOS ANGELES HERALD EXAMINER, DIVISION OF THE HEARST CORP., ET AL., PETITIONERS

v.

RALPH E. KENNEDY, REGIONAL DIRECTOR OF REGION 21 OF THE NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR RESPONDENT KENNEDY

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 350

THE LOS ANGELES HERALD EXAMINER, DIVISION OF THE HEARST CORP., ET AL., PETITIONERS

v.

RALPH E. KENNEDY, REGIONAL DIRECTOR OF REGION 21 OF THE NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR RESPONDENT KENNEDY

We are filing this supplemental memorandum to advise the Court that, on August 27, 1970, the Board issued its decision in the main unfair practice proceeding, to which the injunction proceeding which is the subject of the present petition is ancillary. *Los Angeles Newspaper Guild, Local 69, et al.*, 185 NLRB No. 25, 75 LRRM 1014, holding that the unions

had engaged in secondary boycott activity in violation of Section 8(b)(4)(B) of the National Labor Relations Act; petition to review filed August 31, 1970, No. 26370 (C.A. 9). In these circumstances, the injunction proceeding in which petitioner seeks party status has become moot. *Sear Roebuck & Co.* v. *Local 419, Carpet Layers Union*, 397 U.S. 655.

Respectfully submitted,

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
National Labor Relations Board.

OCTOBER 1970.

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SUPREME COURT OF THE UNITED STATES

October Term, 1970

LOS ANGELES HERALD-EXAMINER *v.* KENNEDY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 350. Decided October 12, 1970

PER CURIAM.

The motion of The Chamber of Commerce of the United States for leave to file a brief, as *amicus curiae*, is granted. The motion to defer consideration of the petition for a writ of certiorari is denied.

The petition for a writ of certiorari is granted. The orders of the Court of Appeals are vacated and the case is remanded to the United States District Court for the Northern District of California with directions to dismiss the case as moot. *Sears, Roebuck & Co.* v. *Carpet Layers*, 397 U. S. 655.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of these motions or this petition.